

### C. Abuse Of Process Issue Against Adams – Phase III

#### 1. Legal Standard Applicable to Abuse of Process

189. “Abuse of process is a broad concept that includes the use of a Commission process to achieve a result that the process was not intended to achieve or to use that process to subvert the purpose the process was intended to achieve.” Commercial Realty St. Pete, Inc., 15 FCC Rcd 7057, ¶ 2, n. 10 (1999); see also High Plains Wireless, L.P., 15 FCC Rcd 4620, ¶ 9 (2000); Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process [hereinafter Prevention of Abuse of the Renewal Process], 4 FCC Rcd 4780, ¶ 1, n. 2 (1989). In this instance, the “process” is the Commission’s comparative renewal application process, the intended purpose of which is to acquire a broadcast license. See Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26.

Abuse of the renewal process hurts the public interest in several ways. Incumbent licensees are required to expend considerable amounts of money to defend against and pay off challengers, including those who are unfunded and have no real intention of owning or operating a station. Moreover, the staff and management of the incumbent are forced to spend considerable funds as well as time and effort opposing challenges to license renewals. The expenditure of such resources that might have been devoted to programming and

other services, to defend against an abusive challenger is inefficient and wasteful. Non bona fide challengers may also discourage bona fide competing applicants and unnecessarily drain Commission resources.

Id., ¶ 22.

190. A determination that an applicant abused the comparative renewal process requires a finding that the filing of the application was motivated by an improper purpose -- *i.e.*, that the applicant undertook the process with an intention *other* than to acquire the broadcast license. See WWOR-TV, Inc., 7 FCC Rcd 636, ¶ 25 (1992), aff'd sub nom. Garden State Broadcasting, L.P. v. FCC, 996 F.2d 386 (D.C. Cir. 1993); see also K.O. Communications, Inc., 14 FCC Rcd 8490, ¶ 23 (1998); Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26. Thus, for example, an applicant abuses the Commission's comparative renewal process by filing an application for the purpose of reaching a settlement for the payment of money, the transfer of assets, or for any other thing of value. See K.O. Communications, Inc., 14 FCC Rcd 8490, ¶ 23; WWOR-TV, Inc., 7 FCC Rcd 636, ¶ 42; Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26; see also 47 U.S.C. § 311(d).

191. Even when an applicant intends to construct and operate the proposed station, the application is considered an abuse of process if an improper motive also exists. See Millar v. FCC, 707 F.2d 1530, 1535 n.7, (D.C. Cir. 1983); Capitol Broadcasting Co., 30 FCC 1, 2, 3 (1961); Blue Ridge Mt. Broadcasting Co., 37 FCC 791, 800 (Rev. Bd. 1964), rev. denied, FCC 65-5

(Jan. 6, 1965); aff'd sub nom. Garden County Broadcasting Co. v. FCC, 6 RR 2d 2044 (D.C. Cir. 1965) (memorandum opinion). Accordingly, an abuse of process exists where there is a mixed motive in which part of the applicant's underlying purpose is something other than to construct and operate the proposed station.

192. Filing for the purpose of reaching a settlement is but one example of an abuse of the comparative renewal process. As noted above, the abuse of process concept is broad and includes the use of the comparative renewal process with *any* intent other than a bona fide intent to own and operate the broadcast station for which it seeks to acquire the license at issue. WWOR-TV, Inc., 7 FCC Rcd ¶ 25; see also K.O. Communications, Inc., 14 FCC Rcd 8490, ¶ 23 (1998); Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26. As demonstrated below, when it filed its application, Adams did not have a bona fide intent to own and operate a broadcast television station on Channel 51 in Reading, Pennsylvania. Even by Adams' own admissions, part of its motivation was improper (*i.e.*, seeking a precedent against home shopping programming). Adams' application was, therefore, an abuse of the Commission's comparative renewal application process and must be denied. WWOR-TV, Inc., 7 FCC Rcd at ¶ 42 (abuse of the comparative renewal process warrants denial of the application on basic qualification issues).

**2. Adams' Application Was Not Filed With A Bona Fide Intent To Own And Operate A Broadcast Television Station On Channel 51 In Reading, Pennsylvania.**

193. One of the principal cases on the issue of abuse of the comparative renewal process is WWOR-TV, Inc., 7 FCC Rcd 636 (1992), aff'd sub nom. Garden State Broadcasting, L.P. v. FCC, 996 F.2d 386 (D.C. Cir. 1993) ("Garden State"). In that case the Commission found two factors to be "especially probative" as indications that the challenger had not filed with the intention of acquiring, owning, and operating the television station at issue: first, the Commission found that the challenging applicant's stated reason for filing its application "was at best without credibility and at worst false and misleading" and, second, the remaining evidence of the challenging applicant's purpose did not demonstrate a primary interest in owning the television station. Garden State, 996 F.2d at 391; see 7 FCC Rcd at ¶ 25. "As additional evidence of intent, the FCC relied on the fact that [the principals of the challenging applicant] formed [the challenging applicant] almost immediately after they received large payments from [a prior comparative renewal challenge] settlement." Garden State, 996 F.2d at 391; see 7 FCC Rcd at ¶ 25.

194. As in Garden State, Adams' stated reason for filing its application here is, at best, without credibility and, at worst, false and misleading. Likewise, the remaining evidence of Adams' intent does not demonstrate a primary interest in owning Channel 51 in Reading,

Pennsylvania. Finally, as in Garden State, Adams was formed for the purpose of filing a comparative renewal challenge almost immediately after its principals received large payments in settlement of their prior comparative renewal challenge of Video 44. Accordingly, Adams' comparative renewal application must be dismissed as an abuse of process.

- a. **Adams' stated reason for filing its application is, at best, without credibility and, at worst, false and misleading**

195. Throughout this process, Adams has given inconsistent testimony about why it filed its application for Channel 51 in Reading, Pennsylvania. Initially, Adams claimed that the purpose of its application was to contest the public interest value of home shopping programming. [Gilbert Decl., ¶¶ 7-11 (Reading Ex. 24); November 22, 1999 Opposition of Adams Communications Corporation to Reading's Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process) at 8; Gilbert Testimony, Tr. 1114:25-1115:13, 1118:2-1119:4, 1124:20-25, 1132:7-20]

196. Even though Adams knew the Commission had decided a year before Adams' application was filed that home shopping programming serves the public interest, Adams adamantly insists that it was formed "for the purpose of challenging the renewal of television stations airing home shopping programming which was not serving any local interest" and that,

through the mechanisms of the competitive renewal application process, Adams would be able to demonstrate that home shopping programming fails to serve the public interest. [Gilbert Decl., ¶¶ 7-11 (Reading Ex. 24)] In fact, in its Opposition to Reading's Motion, Adams confirmed that "Adams's principals have uniformly testified that they chose to challenge RBI's renewal because they do not and did not believe that the home shopping television format serves the public interest." (November 22, 1999, Opposition of Adams Communication Corporation to Reading's Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process) at 8.)

197. In January, in conjunction with his testimony in Phase I, Gilbert further confirmed that Adams' motivation in pursuing its challenge against Reading was to obtain a Commission precedent against the public interest value of home shopping programming. In that regard, Gilbert testified:

The Court: Was there any consideration given, you have a very interesting group of business people there.

Mr. Gilbert: Yeah.

Q: Formulate some kind of syndicate, and then they can offer a sum of money to get an assignment of a channel on which the shopping was being, the home shopping was being broadcast. Would you be able to then change the name to something that would be more cerebral or –

A: That wouldn't have achieved the result we were trying to achieve. We'd been successful in Monroe, in first

knocking off pay TV. Equally or more important, as it came, we stopped pornography in the United States. . . .<sup>23</sup>

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The Court: You left [Channel] 44 in '92. The business plan, you were concerned about home shopping. Home shopping was bothering you. Your group.

Mr. Gilbert: Right.

Q: I'm asking you was there an option or could an option have been considered about buying one of those stations and taking home shopping off and turning it around. And I don't know what you answered to that, but you didn't answer my question. You said something about that wouldn't work.

A: What happens in these cases is, the problem is how to get the FCC to make a statement and do something so you would change the nature of broadcasting. If we buy – We believe home shopping network –

Q: Okay.

A: Can I answer it differently?

Q: Yes.

A: We believe Home Shopping Network is not –

Q: Wait just a second. With that answer you know, with that answer then what you're suggesting to me is that first you're saying a transfer or *assigning*<sup>24</sup> of a Chicago station which was specializing in home shopping would not have accomplished what you wanted to accomplish because that would not have involved the FCC and making some sort of a public interest statement as they were required to do in Video 44.

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<sup>23</sup> Gilbert pronounced the Monroe case to have been "highly successful from our point of view." However, if the goal was to acquire and operate a television station serving the local public interest, then the Monroe case could only be deemed a failure. [See Gilbert Testimony, Tr. 1114:25-1116:3]

<sup>24</sup> Errata – the original transcription reads "*of a signing*."

A: Right.

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The Court: And now you're moving on to Reading, and the route you've just outlined here. You want to go after Reading because you want the Commission to make a statement about home shopping. I'm paraphrasing what you're saying.

Mr. Gilbert: That's correct.

[Gilbert Testimony, Tr. 1114:25-1115:13, 1118:2-1119:4, 1124:20-25]

198. The ALJ memorialized Adams' sworn statement of intent shortly thereafter, finding that Gilbert "confirmed under oath that Adams' sole interest in prosecuting its application is to remove home shopping from all of broadcasting because in Adams' view it is economically impossible to provide public service broadcasting on a home shopping channel." [Memorandum Opinion and Order, FCC 00M-07, ¶ 4 (released January 20, 2000)] In fact, Mr. Gilbert even went so far as to characterize the Adams principals as public interest crusaders. [Gilbert Testimony, Tr. 1132:7-20]

199. The ALJ granted, in part, Reading's Motion and added the instant abuse of process issue to explore the question of Adams' intent in filing and prosecuting its application. [Memorandum Opinion and Order, FCC 00M-07 (released January 20, 2000)] On February 7, 2000, Adams sought leave to appeal the addition of the abuse of process issue. In denying Adams' request for leave to appeal, the ALJ indicated that the filing of an application for the purpose of obtaining a precedent against home shopping programming (i.e., a "thing of value" to Adams) might, itself, be an abuse of



the comparative renewal application process. [See Memorandum Order and Opinion, FCC 00M-19, ¶¶ 7-11 (released March 6, 2000)]

200. Only then, faced with the possibility that its initially stated position could result in an abuse of process finding against it, did Adams claim that its primary purpose in filing its application was actually to own and operate a television station in Reading, Pennsylvania, and that its previously claimed purpose of advancing the public interest by obtaining a precedent against home shopping programming was only a secondary goal. Specifically, Adams claimed that:

Mr. Gilbert knew that, if the incumbent licensee did not receive a “renewal expectancy”, a competing applicant for that license would have a reasonable chance of obtaining the license for the limited cost of preparing and successfully prosecuting the competing application. Since that cost would invariably be less than the value of the station which could be obtained through the comparative renewal process, Mr. Gilbert perceived the opportunity to file a competing application against a “home shopping” station to be both a prudent undertaking as business matter (since it could result in the obtaining of a valuable television station at a bargain price) and a salutary effort to advance the important public interest inherent in promoting substantial, locally-oriented, locally-produced programming relating to issues of local importance.

[Supplement to Answers of Adams Communication Corporation to Interrogatories, filed May 16, 2000, at 3] Gilbert affirmed that statement under penalty of perjury. [Id. at 14]

201. Both Adams’ initial testimony and the revised position stated in its Supplement to its interrogatory answers are inconsistent with the

Commission's abuse of process policy. The only valid basis for filing an application is the intent to construct and operate the proposed station. A primary or secondary intent to achieve some other goal constitutes an abuse of process. See supra at ¶¶ 190-91. Accordingly, by Adams' own admissions, both prior to and after the abuse of process issue was designated, Adams' application was filed for improper purposes.

202. Apparently realizing that its "public interest" rationale was not credible and would not result in a favorable finding, Adams took a different tack at the Phase III hearing. Thus, on June 21, 2000, Gilbert testified that Adams decided to file its application "[b]ecause it was a low-cost way to obtain a television station." [Gilbert Testimony, Tr. at 2467:14-20] Adams now abandoned its prior claim to an interest in fighting home shopping programming by obtaining a Commission precedent

Mr. Cole: Could you tell me why Adams decided to file a comparative renewal application, that is, a challenge application against an incumbent renewal licensee?

Mr. Gilbert: Because it was a low-cost way to obtain a television station. It's also a way that we could do what we want to do in the broadcast industry, which was to provide some public service.

Q: Could you explain the last part of your answer, please?

A: Well, we assumed that we would be replacing a Home Shopping Network station and it was a strong belief of a number of the principals that Home Shopping Network was, I would say, a star in television, it had no real place either.

Q: And how would the comparative renewal process have resulted in replacing home shopping programming with something else?

A: The comparative renewal process would pit Adams against a station which presumably wasn't providing locally originated programming that dealt with community issues.

Q: Could you explain why Adams was interested in home shopping programming?

A: Adams was looking for a way to obtain a station<sup>25</sup> and it appeared that the kind of programming that would be most vulnerable would be Home Shopping Network programming. A number of the principals, a significant number of them actually, had viewed Home Shopping Network in Chicago and around the country, and in general, they believed that it wasn't doing what they believed to be the job of broadcast stations; that it wasn't serving the local communities as they saw it. So they felt that, in general, it would be vulnerable to a challenge.

Well, they also had followed the FCC proceeding and I had read the dissent of Commissioner Duggan and the very interesting concurring opinion of Commissioner Barrett. We also had been following the pleadings of the Media Access Project. I had been talking to Andy Schwartzman, with whom I had a long-term relationship, about what was going on, and we thought that many, if not all, of the Home Shopping Network stations weren't following through on what they were supposed to be doing; that they weren't providing locally originated programming that dealt with the community problems.

[Gilbert Testimony, Tr. 2467:14-2469:5]

203. Adams' position with respect to its invocation of the comparative renewal application process has changed 180 degrees during the course of

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<sup>25</sup> Of course, this testimony must be considered in light of the fact that, just prior to commencing its pursuit of this comparative application process, Adams/Monroe, for all intents and purposes, had a station – Channel 44 in Chicago, Illinois. That being the case, it seems dubious, at best, that “Adams was looking for a way to obtain a station.”

these proceedings, going, first, from having the sole purpose of removing home shopping programming from the airways by obtaining a Commission precedent, to having such precedent being merely a secondary interest, to being indifferent to home shopping programming except to the extent that it was a potentially vulnerable form of programming which Adams could exploit to obtain a television station license. Faced with the likelihood that its previously stated purpose of obtaining an FCC precedent against home shopping programming would result in an abuse of process finding against it, Adams changed its story. Adams' most recent pronouncement of an intent to obtain the Channel 51 broadcast license is, at best, without credibility and, at worst, false and misleading.

204. Not only is Adams' testimony internally inconsistent, it is also inconsistent with the surrounding circumstances. Thus, Adams has stated that it did not matter where in the country the station it challenged was located. [Gilbert Testimony, Tr. 1119:7-1124:9] The determinative factor in selecting which station to challenge was solely based on which "home shopping" station's license came up for renewal first. [Id.] Nor did Adams care whether the station it applied for was profitable.<sup>26</sup> [Gilbert Testimony,

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<sup>26</sup> In fact, in this regard, Gilbert, once again, emphasized Adams' interest in public service:

Mr. Hutton: Did you ever research the income or revenue of the station WTVE before filing the Adams application?

Mr. Gilbert: No. We weren't interested in that. We were a public interest case.

Tr. 1065:21-1066:3] This testimony negates Adams' claim that it was seeking a profitable opportunity to acquire a television station. Thus, if Adams' motive were to obtain a station at a bargain price, then presumably Adams would have sought the best bargain available. Yet Adams did not file its application against the most valuable station airing home shopping programming, instead it merely filed against the next home shopping station in line for license renewal, a station that had recently been in bankruptcy. [Gilbert Testimony, Tr. 1110:13-16, 1123:9-1124:2]

205. The record also shows that Adams never made any effort to even look for, let alone purchase, a television station, anywhere. [Gilbert Testimony, Tr. 2542:1-6] If Adams' true intent was to gain ownership of a television station at a bargain price, as it now claims, regardless of location or profitability, it stands to reason that it would have first, at least, tried to find a station it could simply buy outright. In the Phase I cross-examination, Gilbert claimed that buying a station had not been considered as an option because that would not have achieved the purpose of obtaining an FCC precedent against home shopping programming. [Gilbert Testimony, Tr. 1118:21-1119:4] Adams' revised explanation about its motives contradicts this initial testimony.

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[Gilbert Testimony, Tr. at 1065:21-24]

206. Certainly, if location and profitability are not considerations, one would expect that Adams could have found a station, perhaps one in financial difficulty, that it could purchase outright for a “bargain price.” Yet, Adams made no effort, whatsoever, even to determine whether a “bargain price” station might be for sale. It is inconceivable that, if it truly wanted to obtain a television station at a “bargain price”, Adams, knowing full well the vagaries of the comparative renewal process and the historically low record of success by overfilers [Gilbert Testimony, Tr. 1013:16-17], would undertake the significant risks, uncertainties, and costs involved in the comparative renewal process without at least looking into the possibility of buying a station outright. The only reasonable explanation for not first looking to buy a station is that obtaining a station is not and never has been Adams’ primary purpose; Adams’ recent claim to such purpose is clearly without credibility. Rather Adams’ actions suggest that Adams decided that a comparative renewal challenge was a no-risk proposition because Adams could, as indicated in its retainer agreement with B&C, expect to reach an “economically favorable” settlement that would, at least, reimburse Adams’ expenses. [See Adams’ Fee Agreement (Reading Ex. 21); Gilbert Testimony, Tr. 1019:19 – 1020:19]

207. In addition, Adams’ claim that it pursued the comparative renewal process because the cost of obtaining a station through that process would invariably be less than the value of the station which could be obtained

is, itself, suspect. Thus, Adams never sought to appraise or value WTVF (or Adams' initial target, WSHH in Marlborough, Massachusetts), prior to filing its application. [Gilbert Testimony, Tr. at 1065:21-1066:9; 2530:17-19] Nor did Adams solicit a sales price from Reading (or from the owner of WSHH), prior to filing its application. [Gilbert Testimony, Tr. at 2530:13-22, 2541:19-25] Thus, there is simply no factual support for Adams' claim that it would be less expensive to acquire WTVF, or any other station, through the comparative renewal process rather than through outright purchase of the station. Without having done an investigation into the value of WTVF and the cost to purchase it outright versus the cost of litigation (with the attendant risk of losing on the merits), Adams' claim that engaging in the comparative renewal process would result in obtaining WTVF at a bargain price is baseless speculation at best and post hoc rationalization, at worst. Again, if this truly were Adams' motive, then Adams presumably would have targeted the most valuable home shopping station, instead of just taking the luck of the draw to challenge the next home shopping station coming up for license renewal, particularly one that had recently been in bankruptcy. [Gilbert Testimony, Tr. 1110:13-16, 1123:9-1124:2]

208. Finally, and perhaps most significantly, if, as it now claims, Adams filed its application for the primary purpose of obtaining a television station at a "bargain price," why did it abandon Channel 44 in Chicago? Thus, as of September 1992, the Adams principals (conducting their business

as Monroe Communications) were the prevailing applicants for Channel 44 in Chicago – a station worth in excess of \$50 million. [Gilbert Testimony, Tr. 1003:18-1005:4, 1130:22-1131:2] Monroe, however, after more than a decade of litigation and with only Video 44's appeal left to contend with, gave up its pursuit of that television station license in exchange for a "huge sum of money" without ever operating the station. [Gilbert Testimony, Tr. 1007:3-4, 1130:11-25, 2516:19-2517:7; Gilbert Decl., ¶¶ 5-6]

209. Almost immediately thereafter, however, Adams began its pursuit of a "home shopping" station to challenge. [Gilbert Testimony, 1114:2-6, 2471:13-2474:7; Joint Request for Approval of Settlement Agreement, Dismissal of Monroe Application and Grant of Video 44 Application (Reading Ex. 19); Order, FCC 92I-097, released December 24, 1992, approving the Monroe Settlement Agreement (Reading Ex. 22); Letter from Cole to Gilbert dated July 16, 1993 and enclosing list of television stations licensed to subsidiaries of the Home Shopping Network (Adams Ex. 66)] As noted above, in this proceeding, Gilbert testified that Monroe had been "highly successful" from his point of view, even though Monroe never operated the station in Chicago. [Gilbert Testimony, Tr. 1116:3] This testimony makes it clear that owning and operating a station was not Adams' goal.

210. Adams/Monroe claims that it settled the Video 44 case because Univision would not deal with them and Telemundo was in financial trouble,



leaving Monroe without a source for its proposed Spanish language programming. [Gilbert Testimony, Tr. 1007:13-1009:9, 1127:18-1131:13] However, Adams claims that it planned to air Spanish language programming in Reading [Gilbert Testimony, Tr. 1125:1-1127:8; Fickinger Testimony, Tr. 2441:18-2445:21], yet Adams never investigated the availability of Spanish language programming in Reading. [Gilbert Testimony, Tr. 1107:11-14; Haag Testimony at 17:3-18 (Reading Hearing Ex. 44)] Having just been frustrated in its plans to go on the air in Chicago due to the unavailability of Spanish language programming – which purportedly forced it to sacrifice a \$50 million station for a paltry \$17 million – Adams/Monroe presumably would have learned the costly lesson about the need to assure itself of programming in connection with a renewal challenge. But while Adams/Monroe claims that it had the same programming plans for Channel 51 in Reading that it had for Channel 44 in Chicago, it inexplicably has never investigated the availability of Spanish-language programming in Reading.

211. Adams' initial claim of being on a public service crusade against home shopping programming is, itself, without credibility for several reasons. First, the Commission had recently decided that home shopping programming serves the public interest in a decision Adams knew about. From the outset, then, the "crusade" was focused on an unlikely target. Second, Adams/Monroe never even bothered to file comments in the

Commission's home shopping proceeding or seek a reversal of that decision. It strains credulity to believe that Adams was so exercised over the issue that it would embark on the type of crusade it described but not bother to file comments in the rulemaking or seek a reversal of the decision reached in the rulemaking. Third, the timing of Adams' formation suggests that Adams' principals were hoping to replicate the successful financial outcome of the Monroe case. In particular, Adams' retainer agreement with B&C (signed in 1999 but reflecting an agreement in place from the outset) indicates that the prospect of reaching an "economically favorable" settlement was very much on the minds of Adams and its counsel. Finally, Adams was not even sufficiently familiar with home shopping programming to distinguish between a cable home shopping channel and WTVE's on-air programming. If Adams were willing to spend years locked in a costly legal battle over home shopping programming as a public interest issue, it is reasonable to expect that it would understand this type of fundamental distinction.

212. Even if the Commission were to accept Adams' explanation that it was on a public interest crusade for an FCC decision adverse to home shopping programming as either Adams' primary or secondary motivation, then Adams' application constitutes an abuse of process. Commission case law makes it clear that an application constitutes a "strike application" when the underlying intent for the application, either in whole or in part, involves a purpose other than to own and operate the proposed station. Prevention of

Abuse of the Renewal Process, supra; Garden State, supra; Millar v. FCC, supra; Capitol Broadcasting Co., supra; Blue Ridge Mt. Broadcasting Co., supra. Accordingly, by Adams' own explanation, this application represents an abuse of process.

213. Adams' revised claim that its sole purpose was to obtain the Channel 51 broadcast license is, at best, without credibility and, at worst, false and misleading. Moreover, as demonstrated below, the remaining evidence of Adams' intent does not demonstrate a primary interest in owning the television station in Reading, Pennsylvania.

**b. The remaining evidence of Adams' intent does not demonstrate a primary interest in owning Channel 51 in Reading, Pennsylvania.**

214. That Adams did not file its application with a bona fide intent to own and operate Channel 51, Reading, Pennsylvania, is further demonstrated by an examination of the remaining evidence.

**i. Adams' lack of a legitimate interest in Channel 51, Reading, Pennsylvania, is inconsistent with an intent to own and operate that station.**

215. The evidence plainly shows that Adams has no legitimate interest in owning a television station in Reading, Pennsylvania. Thus, none of the Adams principals are from Reading, Pennsylvania, or have ever lived in or around Reading, Pennsylvania. [Adams' Application (Reading Ex. 10 at

5-8); Gilbert Testimony, Tr. 1067:2-4] Nor does Adams have an interest in public service broadcasting in Reading, Pennsylvania, beyond its purported interest in public service broadcasting in general. [Gilbert Testimony, Tr. 1019:19-22; see also Tr. 1119:17-18 ("This isn't a great place to be, Reading. It's hard to get to, all kinds of things.")]

216. Moreover, Adams was not formed for the purpose of mounting a challenge for Channel 51, Reading, Pennsylvania, but rather for the purpose of challenging the first "home shopping" station whose license was up for renewal, without regard to its location or value. [Gilbert Decl., ¶ 7 (Reading Ex. 24); Gilbert Testimony, Tr. 1119:7-1124:9, 2471:10-16, 2473:15-2474:7; Letter from Cole to Gilbert dated July 16, 1993 (Adams Ex. 66 at 1-2)] In fact, Channel 51 in Reading, Pennsylvania was not even Adams' first choice of targets. Adams originally sought to challenge Channel 66 in Marlborough, Massachusetts. [List of full-power television stations licensed to subsidiaries of the Home Shopping Network (Adams Ex. 66 at 2); Gilbert Testimony, Tr. 2474:8-18] To that end, Adams incorporated in Massachusetts and enlisted a local resident, Elinor Woron, as a shareholder owning a minor interest. [Articles of Organization (Reading Ex. 71); Gilbert Testimony, Tr. 996:18-232474:8-10; 2517:8-10] Adams only decided to challenge WTVE after it failed to locate a suitable transmitter site in Massachusetts, and only then because WTVE was the next "home shopping" station to come up for license

renewal. [Gilbert Testimony, Tr. 1042:11-21, 1123:15-1124:2, 2475:21-2475:11, 2476:12-18, 2478:15-17]

- ii. Adams' failure to make a legitimate effort to evaluate WTVE's programming before it filed its application is inconsistent with an intent to own and operate Channel 51.

217. Although Adams takes the position that home shopping programming generally does not serve the public interest, it concedes that a home shopping station could still provide sufficient other local programming and public service to serve the public interest. [Gilbert Testimony, Tr. 1060:14-19, 1041:20-1042:5, 2468:9-2469:5, 2473:15-20, 2497:22-2498:6] Nevertheless, Adams made no credible effort to evaluate WTVE's programming prior to filing its application. Thus, no one on behalf of Adams actually viewed WTVE's programming prior to Adams' filing its application. [Gilbert Testimony, Tr. 1064:24-1065:1] Although Adams understood that every television station has to make its public inspection file available to interested parties [Gilbert Testimony, Tr. 1011:18-21], Adams did not review WTVE's public inspection file to determine what public service programming the station was airing. [Gilbert Testimony, Tr. 2541:16-18] Nor did Adams retain an expert or a consultant to evaluate WTVE's programming. [Gilbert Testimony, Tr. 2540:19-22]<sup>27</sup>

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<sup>27</sup> Gilbert's failure to even watch WTVE during one of his visits to Reading or to review WTVE's public inspection file is simply mind-boggling, given his past experience challenging a station's renewal application.

218. In fact, Adams' entire programming evaluation effort consisted of Gilbert's personal, informal survey of 30 to 40 people in Reading, his conversations with Paul Sherwood, a computer systems consultant, and Gilbert's alleged review of some video tapes prepared by Mr. Sherwood. [Gilbert's Testimony, Tr. 2475:21-2476:11; 2476:19-2477:1, 2478:15-17, 2483:13-2484:10, 2538:7-17, 2539:3-5; Sherwood Testimony, Tr. 2137:11-16, 2139:11-15; 2149:2-16, 2154:17-2156:1] As demonstrated below, these very minimal efforts were undertaken without any serious diligence and, as a result, were wholly ineffective.

(a) Gilbert's survey

219. Between February and June 1994, Gilbert, on behalf of Adams, made 3 or 4 trips to Reading. [Gilbert Testimony, Tr. 2475:21-2476:11, 2476:19-24, 2478:15-17, 2538:7-14] During these trips, Gilbert informally interviewed 30 to 40 people. [Gilbert Testimony, Tr. 2476:19-2477:1, 2538:15-17]<sup>28</sup> The interviews were conducted solely at business establishments, including malls and restaurants. [Gilbert Testimony, Tr. 2538:18-20] Gilbert did not conduct any interviews at peoples' homes. [Gilbert Testimony, Tr.

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<sup>28</sup> Gilbert did not ask the names of the people he interviewed and nor did he took any notes or make any written record of the interviews [Gilbert Testimony, Tr. 2538:25-2539:5]. As a result, the veracity of Gilbert's claim to have conducted such interviews and, if conducted, their content, is unverifiable.

2538:21-24] None of the people Gilbert interviewed was aware of WTVE.  
[Gilbert Testimony, Tr. 2539:6-10]

220. This survey, however, does absolutely nothing to advance Adams' claim that it filed its application because it believed that WTVE's programming was insufficient to serve the public interest of the Reading community. Thus, Gilbert's survey is defective as a means of determining WTVE's public service in that:

- There is no indication that any of the people Gilbert interviewed were actually from the WTVE viewing area or received WTVE via cable;
- The interviews were conducted at business establishments, including malls and restaurants, not at peoples' homes; thus, the pool of interviewees was comprised of those people *least* likely to view "home shopping" programming (i.e., those who could and did use retail shopping outlets), rather than those most likely to view "home shopping" programming;
- The scope of the survey, 30-40 people, comprised less than 1/1000th of a percent of the population that Adams proposed to serve. [Adams Application (indicating a population of 4,066,085 within the proposed service area according to the 1990 Census) (Reading Ex. 10 at 30)];
- It is not clear that Gilbert even knew WTVE's call sign or understood the distinction between WTVE's signal and Home Shopping Club

service distributed via cable, so it is not known if he was able to ask meaningful questions about WTVE. [Section (c) below and Letter from Gilbert to Swanson, dated April 22, 1999 (Reading Ex. 57) (describing WTVE as "Station WNET (T.V.) in Redding, Pennsylvania")]; and

- Finally, according to Gilbert, none of the people he spoke to ever viewed WTVE; as a consequence, they cannot have provided him with any insight into WTVE's programming.

(b) Sherwood's reports

221. Adams also claims to have based its determination of WTVE's public service programming on reports Gilbert received from Sherwood. Adams' reliance on reports from Sherwood as a basis for evaluating WTVE's public service is misplaced. Thus, Sherwood was, and remains today, a computer systems consultant. [Sherwood Testimony, Tr. 2137:11-16] He is not, and never has been, a professional media consultant, nor does he have any expertise in analyzing or evaluating the content of television programming or the public service performance of television stations. [Sherwood Testimony, Tr. 2149:22-2150:14]

222. In any case, Adams' testimony with respect to Sherwood's "reports" lacks credibility. Thus, in his November 22, 1999 Declaration, Gilbert claims that "[a]s the taping project was on-going, I spoke regularly with the person who was in charge of making the tapes, and I was regularly briefed on the contents of the programming being taped." [Gilbert Decl., ¶



12] In Gilbert's January testimony, however, "regularly" became "daily."  
[Gilbert Testimony, Tr. at 1069:13-21]

223. In June, Gilbert then recanted his January testimony that he spoke to Sherwood on a daily basis and, instead, claimed that he had spoken with Sherwood a couple of times a week.

Mr. Cole: Now, back in your January testimony, I believe you testified that you spoke with Mr. Sherwood every day or on a daily basis during the taping.

Do you recall that testimony?

Mr. Gilbert: Yes.

Q: Do you have any reason to wish to revise that testimony?

A: Yes, sir. It is my understanding that I really didn't talk to him every day. I talked to him a couple of times a week.

Q: Prior to your testimony in January, had you reviewed in detail any records concerning the taping process involving Mr. Sherwood?

A: No.

Q: So was the basis for your January testimony?

A: Once again, it was my recollection of what had occurred six years prior.

Q: Since then have you had the opportunity to review other information concerning the taping process?

A: Yes, I have, and that information leads me to revise my answer.

[Gilbert Testimony, Tr. 2492:10-2493:5] The "other information," however, turned out to be Mr. Sherwood's deposition testimony.

Mr. Southard: Well, Okay. How did it come up that you changed your testimony from the – the first testimony, if I recall correctly, was that you spoke to [Mr. Sherwood] on a daily basis to your current testimony.

Mr. Gilbert: Oh, I saw his deposition.

Q: Okay, so you changed your testimony based on Mr. Sherwood's deposition?

A: Yes.

[Gilbert Testimony, Tr. at 2549:13-20]

224. Contrary to Gilbert's testimony, Sherwood testified that, to the best of his recollection, he spoke to Gilbert once after having done the initial June 1, 1994 recording and then only once during the process of making the remaining videotapes. [Sherwood Testimony, Tr. 2149:2-16]

225. Gilbert's testimony, based as it is on Sherwood's testimony rather than any apparent independent recollection by Gilbert, raises serious questions as to the veracity of his prior testimony – e.g., that he spoke to Mr. Sherwood on a daily basis – and, for that matter, on his present testimony that he spoke with Mr. Sherwood "a couple times a week."

(c) Gilbert's alleged review of the videotapes

226. Adams also claims to have based its determination of WTVE's public service on Gilbert's personal review of the videotapes he received from Sherwood. Adams' reliance on Gilbert's alleged review as a basis for evaluating WTVE's public service is misplaced for the simple reason that the